In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1539

ROBERT DAVID ZMUDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner, a Selective Service registrant, was convicted of failing to report for an Armed Forces physical examination, in violation of 50 U.S.C. App. 462.[1] On March 20, 1969, he was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 11-20).

[1] Petitioner was charged and convicted on another count—for failing to report for induction. Basing its decision on *Gutknecht* v. *United States*, 396 U.S. 295, the court of appeals reversed as to that count, finding that petitioner's induction had been accelerated because of his status as a delinquent registrant (Pet. App. 13). Since the sentences on the two counts were concurrent, the court below, applying this Court's holding in *Benton* v. *Maryland*, 395 U.S. 784, concluded that it was "both compelled and justified" in affirming the conviction on the other count (Pet. App. 20, n. 9). Petitioner raises no question regarding the propriety of applying the "concurrent sentence" doctrine in the instant case.

Petitioner registered for the draft in 1967, when he was 18 years old. His claim that he held conscientious scruples against war was rejected and he was classified I–A (T. 26, 47).[2] He did not take an administrative appeal from this classification. Nor, after a brief tenure as a college student, did he appeal his subsequent I–A classification (T. 29, 32, 34–35, 40–41, 115–116).

On May 23, petitioner's local board sent him a questionnaire in preparation for a planned Armed Forces physical examination (SS File 31; T. 42–43). On May 27, 1968, petitioner returned the uncompleted questionnaire, accompanied by his notice of classification and a covering note in which he expressed his readiness to be imprisoned for non-compliance with the Selective Service laws (Pet. 5; T. 37–38, 43–44, 116). On May 28, one day later, the clerk of the local board sent him a notice to report for his physical examination on June 19, 1968 (SS File 35; T. 41, 78–79). On May 31, 1968, petitioner sent this notice back to the clerk, accompanied by a poem which expressed his intent not to comply with the order to take the examination (T. 44–45). He did not report for examination on the date he had been ordered to do so (T. 44, 85, 117). He subsequently failed to report for induction, and the instant prosecution ensued.

Petitioner seeks to excuse his acknowledged failure to report for a physical examination (T. 117) by

[2] "T." refers to the one-volume trial transcript which we are presently lodging with the Clerk of this Court. "SS File" refers to petitioner's Selective Service file, which is included in petitioner's appendix already on file with the Clerk of this Court.

claiming that the order to take the examination was issued by the clerk of his local board in retaliation for his "provocative note" and the return of his notice of classification, and that she was not authorized to issue such an order, at least in those circumstances (Pet. 5-6, 8-9). That contention, the only one made by petitioner, has no factual basis.

Petitioner had previously been classified I-A. As the clerk explained, she and the other clerks kept a record of those registrants with I-A classifications, and, unless informed to the contrary, sent an order to take a physical examination, as a routine matter, whenever a particular registrant's "turn" to do so arrived (T. 81). She testified that petitioner was ordered to take the ordered examination "in turn" (T. 78-79). There is no indication of any effort at retaliation by the clerk or of the advancement of the date of the examination. At trial the clerk testified that she did not know petitioner and believed that she had never seen him prior to trial (T. 45). That the physical examination was anticipated is shown by the fact that, four days before the clerk received petitioner's note, she had mailed him the pre-physical questionnaire. At trial there was no dispute that by mailing the examination order the clerk was performing "a ministerial and routine function" delegated to her by the board. The trial court so instructed and the defense did not object (T. 157, 159). Moreover, the courts of appeals have consistently recognized that local board clerks, by virtue of their office, have the authority to perform such a function, and this Court has uniformly declined to review this issue. *United States* v. *Stark*, 418 F. 2d 901 (C.A. 9), certi-

orari denied, 397 U.S. 969; *United States* v. *Hilgeneck,* 418 F. 2d 233 (C.A. 6), certiorari denied, 397 U.S. 923; *United States* v. *Powers,* 413 F. 2d 834 (C.A. 1), certiorari denied, 396 U.S. 923; *United States* v. *Crowley,* 405 F. 2d 400, 402–403 (C.A. 4), certiorari denied, 394 U.S. 904.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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